Supreme Court of Indiana.

GEORGE BINFORD *v.* THOMAS H. JOHNSON.

One who places in the hands of a child an article known to be dangerous is liable for an injury resulting therefrom.

The fact of an intervening agency between the original wrong and the injury will not prevent a recovery if the injury was the natural and probable result of the wrong.

A dealer sold to two children, aged respectively 12 and 10 years, cartridges for a pistol. One of the children left the pistol loaded with one of the cartridges on the floor of his home, when a third child picked it up and it was discharged, killing one of the children by whom the cartridges had been purchased. *Held*, that the dealer was liable in damages to the father of the child killed.

The complaint is not bad because it does not state the next of kin of the child, if it appears that the plaintiff is the father, that he had lost the child's services and that he had expended time and money in endeavoring to cure the child.

An act in direct violation of a criminal statute is negligence in itself and it is not error for the court so to charge.

APPEAL from Montgomery Circuit Court.

This was an action for damages for causing the death of plaintiff's child.

The facts were as follows: Two sons of plaintiff, Allen and Todd, aged twelve and ten years respectively, bought of the defendant, a dealer in such articles, *pistol cartridges* loaded with powder and ball. The boys purchased the cartridges for use in a toy pistol, and were instructed by defendant how to make use of them in this pistol; the defendant knew the dangerous character of the cartridge, knew the hazard of using them as the boys proposed, and that the lads were unfit to be entrusted with articles of such a character. Shortly after the sale the toy pistol, loaded with one of the cartridges, was left by Allen and Todd lying on the floor of their home; it was picked up by their brother Bertie, who was six years of age, and discharged, the ball striking Todd and inflicting a wound of which he died.

The verdict and judgment were for plaintiff. Defendant appealed.

The opinion of the court was delivered by

ELLIOTT, J.—A man who places in the hands of a child an article of a dangerous character and one likely to cause injury to the child itself or others, is guilty of an actionable wrong. If a dealer should sell to a child dynamite or other explosives of a similar character, nobody would doubt that he had

committed a wrong for which he should answer in case injury resulted. So, if a druggist should sell to a child a deadly drug likely to cause harm to the child or injury to others, he would certainly be liable to an action.

The more difficult question is, whether the result is so remote from the original wrong as to bring the case within the operation of the maxim, *causa proxima non remota spectatur*. It is not easy to assign limits to this rule, nor to lay down any general test which will enable courts to determine when a case is within or without the rule. It is true that general formulas have been frequently stated, but these have carried us, but little, if any, beyond the meaning conveyed by the words of the maxim itself.

The fact that some agency intervenes between the original wrong and the injury, does not necessarily bring the case within the rule; on the contrary it is firmly settled that the intervention of a third person, or of other and new direct causes, does not preclude a recovery if the injury was the natural or probable result of the original wrong: *Billman* v. *The Indianapolis, &c., Co.*, 76 Ind. 166. This doctrine is as old as the famous case of *Scott* v. *Shepherd*, 2 W. Black. 892, commonly known as the "Squib Case."

The rule goes so far as to hold that the original wrongdoer is responsible even though the agency of a second wrongdoer intervened. This doctrine is enforced with great power by COCKBURN, C. J., in *Clark* v. *Chambers*, L. R., 3 Q. B. Div. 327, and is approved by the text writers: Cooley on Torts 70; Addison on Torts, sect. 12.

Although the act of the lad, Bertie, intervened between the original wrong and the injury, we cannot deny a recovery if we find that the injury was the natural or probable result of appellant's original wrong.

In *Henry* v. *The Southern Pacific Railroad Co.*, 50 Cal. 176, it was said: "A long series of judicial decisions have defined proximate or immediate and direct damages to be the ordinary and natural results of the negligence; such as are usual or probable and might, therefore, have been expected." Lord ELLENBOROUGH said, in *Townsend* v. *Wathen*, 9 East 280, that, "Every man must be taken to contemplate the probable consequences of the act he does."

In *Billman* v. *Indianapolis, &c., Co., supra*, very many causes

are cited declaring and enforcing this doctrine, and we deem it unnecessary to here repeat the citations. Under the rule declared in the cases referred to, it is clear that one who sells dangerous explosives to a child, knowing that they are to be used in such a manner as to put in jeopardy the lives of others, must be taken to contemplate the probable consequences of his wrongful act. It is a probable consequence of such a sale as that charged against the appellant, that the explosives may, and will be so used by children among whom it is natural to expect that they will be taken, as to injure the buyers or their associates.

A strong illustration of the principle here affirmed is afforded by the case of *Dixon* v. *Bell*, 5 M. & Sel. 198. In that case the defendant sent a child for a loaded gun, desiring that the person who was to deliver it should take out the priming; this was done, but the gun was discharged by the imprudent act of the child, the plaintiff injured, and it was held that the defendant was liable.

In *Lynch* v. *Nurdin*, 1 Q. B. 29, the doctrine of the case cited was approved, and the same judgment has been pronounced upon it, by other courts, as well as by the text writers: *Carter* v. *Toune*, 98 Mass. 567; Whart. Neg. 851; Shearman & Redf. Neg., 3d ed., 596.

There is no such contributory negligence disclosed as will defeat a recovery. The age of the lads who bought the cartridges, the use the appellant knew they intended to make of them, and the fact that they did use them as instructed by him, are all important matters for consideration upon the question of contributory negligence.

There are very many cases holding that the age of the child is always to be taken into account, and what would be negligence in an adult will not be negligence in a young lad.

The Supreme Court of the United States thus states the rule: "The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of the case:" *Railroad Co.* v. *Stout*, 17 Wall. 657. It must be the law, in cases of this nature, that the age of the child shall be considered, or it must follow that a vendor of the most dangerous explosives may sell them as freely to young children as to men of mature years, and this surely would be a result which no reasonable man would undertake to support. In

Potter v. *Faulkner*, 1 B. & S. 805, ERLE, C. J., said: "The law in England in its care for human life requires consummate caution in the persons who deal with dangerous weapons," and we think it may with equal truth be said that the common law, both of England and America, requires of him who deals with dangerous explosives to refrain from placing them in the hands of children of tender age. If the child is too young to know the character of the thing sold him, it is the business of the dealer to refuse to sell him articles likely to put in jeopardy his own or some other person's life. Where one sells another a dangerous instrument, and that other is ignorant, and this the seller knows, of its true character, he is responsible for injuries resulting from the negligent use of the instrument. There are many well-reasoned cases which, carrying the doctrine still further, hold that one who places a dangerous thing in a position where it is likely to cause injuries to others, is liable to a child who is injured although he may be a trespasser: *Bird* v. *Holbrook*, 4 Bing. 628; *State* v. *Moore*, 31 Conn. 479; *Birge* v. *Gardiner*, 19 Id. 507; *Lynch* v. *Nurdin*, *supra*; *Kerr* v. *O'Connor*, 63 Penn. St. 341; *Keffe* v. *Milwaukee*, *&c.*, *Co.*, 21 Minn. 207; *Railroad Co.* v. *Stout*, *supra*.

The case in judgment does not require us to carry the rule to the extent which is done in the cases cited. Here the appellant, with full knowledge of the character of the cartridges and fully informed as to the use the lads intended to make of them, placed these dangerous instruments in their hands, and he cannot now escape liability upon the ground that the boys had no right to buy or use such articles. Nor can he escape upon the ground that the loaded pistol was left lying where the young child, Bertie, could reach it. One who deals with children must anticipate the ordinary behavior of children. The appellant was bound to take notice of the natural conduct of lads like those to whom he sold the cartridges, and it cannot be justly said that the act of the lads in carrying the pistol with them to their home and leaving it upon the floor, within reach of their brother and playmate, was an unnatural or improbable one.

It is contended that the complaint is bad because it does not state who were the next of kin of the deceased, Todd Johnson, and we are referred to *The Cin.*, *&c.*, *Co.* v. *Chester*, 57 Ind. 297, 304; *Pittsburgh*, *&c.*, *Co.* v. *Vining's Adm'r*, 27 Id. 518;

Indianapolis, &c., Co. v. *Keeley*, 23 Id. 136; *Gann* v. *Worman*, 69 Id. 458.

We do not think these cases support the attack upon the complaint. It is in two paragraphs, and the demurrer is to the entire complaint, so that if one is good the demurrer is not well taken. In the second paragraph it is explicitly set forth that the appellee was the father of the deceased; that he expended money in and rendered services in endeavoring to secure a cure of his son, that he lost his services and society from the time he was wounded until his death. These allegations bring the case within the rule that money expended in the effort to cure a wound wrongfully caused by the act of another may be recovered: *The Cin., &c., Co.* v. *Chester*, 57 Ind. 297; Cooley on Torts 262.

The right of action for the death is a statutory one, and is distinct and different from the personal right in the father recognised by the common law. The complaint shows a right to some relief, and this gives it sufficient strength to withstand a demurrer: *Bayless* v. *Glenn*, 72 Ind. 5.

Additional strength is added to one at least of the paragraphs of the complaint by the facts stated in it, showing that the cartridges were sold in violation of an express statute of the state.

By an act passed in 1875, and incorporated into the revision of 1881 as sect. 1986, it is made a misdemeanor to "sell, barter or give to any person under the age of 21 years any cartridges manufactured and designed for use in a pistol."

In placing the cartridges in the hands of the lads, Allen and Todd, the appellant did an unlawful act, and under settled principles is liable for the consequences naturally and proximately resulting from his unlawful act.

In *Weick* v. *Lander*, 75 Ill. 93, it is held that "where an act unlawful in itself is done from which an injury may naturally and reasonably be expected to result, the injury, when it occurs, may be traced back and visited upon the original wrongdoer."

In the course of the opinion, and as a commentary upon cases reviewed, it is said:

"The principle announced is that whoever does an unlawful act is to be regarded as the doer of all that follows." The decision in the case cited is well sustained. It finds support from the cases heretofore cited, as well as from the following and many others: *Greenland* v. *Choslin*, 5 Exch. 243; *Powell* v. *Deveney*, 3 Cush.

300; *Sheridan* v. *Brooklyn, &c., Co.*, 36 N. Y. 39; *Griggs* v. *Fleckenstein*, 14 Minn. 81; *Wellington* v. *Downer Kerosene Co.*, 104 Mass. 64; *Farrant* v. *Barnes*, 11 C. B. (N. S.) 553.

Appellants attack one only of the instructions given by the court. The instruction assailed reads thus: "I instruct you that a sale of cartridges in violation of a criminal statute of the state, would be, of itself, an act of negligence; and, if you find from the evidence in this case that the defendant sold the cartridges as alleged in the complaint such sale is an act of negligence on his part, and you will have no further trouble on this point." The sole objection stated is, that the court had no right to declare that the sale of the cartridges in violation of law was an act of negligence.

The only case cited in support of appellant's position is the case of *Weick* v. *Lander*, from which we have quoted, and it makes against rather than for appellant.

Where a party does an act in direct violation of a positive statute the court is justified in characterizing it as an act of negligence.

It is in general true that negligence is a question of fact, but this is not universally true.

Judge COOLEY has examined this question, and with ability and vigor discussed it. In the course of the discussion he says: "Many cases clearly present mere questions of law," and that "such are the cases of the disregard of a law expressly devised to prevent the like injury."

An instance is that of the failure of a railway train to come to a stop before crossing another road, as is required by the statute in some states, whereby another train is run into. Here the negligence is plain, but it might happen that some parties injured by it would by their own negligence be precluded from any redress. The case would be equally clear if the railway company were to send out a train without brakes, and thereby an injury should result, through the impossibility of stopping a train when a danger appeared, or if one were to set a bonfire in a town while a fierce wind was raging; or if he were to send a package of dynamite by express without disclosing its dangerous nature. Concerning such cases no one should be in doubt: Cooley on Torts 670.

The principle that the court may, as matter of law, instruct the jury that an act constitutes negligence, is illustrated by many cases in our own reports. Thus, it has often been held that it is

the duty of the court to instruct the jury that it is negligence for a corporation to make a dangerous excavation in a public street, and leave it unguarded. So, in relation to the duties of a railroad corporation, the court often declares to the jury what act will constitute negligence, and this holds good of instructions upon the subject of persons attempting to cross railroad tracks.

But without prolonging this opinion we refer, without comment, to the cases of *The Railroad Co.* v. *Stout*, 17 Wall. 657; *Pittsburgh, &c., Co.* v. *Williams*, 74 Ind. 462; *L. & C. Co.* v. *Richardson*, 66 Id. 43; *Ohio, &c., Co.* v. *Collarn*, 73 Id. 261. It must not be left out of mind that the instruction does not affirm that there may be a recovery, but simply declares that it is negligence for a person to voluntarily do an act in direct violation of a statute.

In a case where there is evidence tending to show some excuse for doing an act prohibited by statute, it might, perhaps, be necessary to qualify the instruction, but there was here no such evidence, and it is to be remarked, the instruction refers, when taken as it must be as an entirety, to such a sale as that charged in the complaint, thus limiting the general proposition to the particular case.

The appellant asked the court to instruct the jury that if the sale was to Todd Johnson and not to him and his brother jointly, that there could be no recovery. We think this instruction was properly refused.

It was sufficient for the appellee to sustain the substance of the issue tendered by him. It was not material whether the boys joined in buying the cartridges, if the sale was to one of them it was an actionable wrong.

Judgment cannot be reversed for an immaterial variance, it is only where the issue in its general scope is not sustained that a reversal will be adjudged: R. S., sect. 393.

Instructions number two and fifteen, asked by the appellant, are substantially the same, and as the former was given by the court, it was proper to refuse the latter.

It is not error to refuse an instruction, when another, embodying the same matter, has been given.

The other questions presented upon the instructions are disposed of in our discussion of the sufficiency of the complaint.

Judgment affirmed.

The controlling point in the principal case and the theory followed is, that the defendant, in making the sale to the minor, violated an express statute; was

guilty of a criminal offence and liable to punishment by fine. Having sold the pistol cartridges in direct violation of the law, he was held liable for all the results that may arise from such sale, and of which it was the primary cause. It is not uncommon to find cases decided upon this theory. Thus, where a sign over a street in a city, hung with due care as to its fastenings but in violation of a city ordinance which subjected its owners to a penalty for placing and keeping it there, was blown down by the wind in an extraordinary gale, and in its fall a bolt which was a part of its fastening struck and broke a window glass in a neighboring window—it was held that the owners of the sign were liable for the injury to the window: *Salisbury* v. *Herdenroder*, 106 Mass. 458.

The extraordinary gale was an intervening agency, and one against which the defendant would not usually have been bound to provide; so in the principal case, the young child's discharging the pistol was an intervening agency; but in both cases the defendants had set in motion something that brought eventually the result for which damages were claimed and given. A long number of cases support this doctrine. The famous *Squib Case* proceeds upon this theory, that the first act was unlawful, and whatever mischief followed, the person first starting the force was liable for all the consequences: *Scott* v. *Shephard*, 2 Blackst. 892. So the Supreme Court of Illinois held that where an act unlawful in itself is done, from which an injury may reasonably and naturally be expected to result, the injury, when it occurs, may be traced back and visited upon the original wrongdoer, and this upon the principle that every person shall be held liable for all those consequences resulting from his act which might have been foreseen and expected as the result; *Wilick* v. *Lander*, 75 Ill. 93. This was a case where the contractor for the erection of a house in Chicago placed a lot of brick in one of the most public streets, in violation of an ordinance, and owing to these and other obstructions it was difficult for teams to pass each other; the plaintiff had two teams hauling sand, one driven by his son twelve years of age; while the teams were returning with their loads the son got upon the back part of the foremost wagon, and while occupying a seat with his back to the tailboard, the wagon was suddenly stopped by a collision with an express wagon at the place of the obstruction, and the driver of the rear wagon, watching to avoid a collision on his part, did not observe the stoppage of the front wagon until he was very near it, and in attempting to stop his wagon the tongue was elevated and struck the boy in the abdomen, inflicting a wound causing his death. It was held that the defendant was liable to the plaintiff, the father, in damages for causing the death of his son. This was somewhat similar to *Illidge* v. *Goodman*, 5 Car. & P. 190, where the servant of the defendant left a horse hitched to a cart standing in the street; a passer-by struck the horse upon the head, and he backed the cart in plaintiff's window and damaged certain goods. The defendant was held liable for the damage. But the doing of an unlawful act is entirely wanting in the case just cited. See *Powell* v. *Dilveny*, 3 Cush. 390.

The principal case is not unlike *Reg.* v. *Bennett*, 4 Jur. (N. S.) 1088; s. c., 28 L. J. (Mag. Cas.) 27; Bell's C. C. 1. There the defendant was a maker of fireworks contrary to a statute, and during his absence, through the negligence of his servant, a fire broke out amongst some combustibles in his possession, which communicated with the fireworks, and caused a rocket to shoot across the street and set fire to a house, in which a person was burnt to death. The court held that a conviction of manslaughter could not be sustained on

these facts. If it had been a civil case for damages, a different result would probably have been reached.

Bearing in mind the facts of the principal case, the remarks of Lord DENMAN, C. J., in *Lynch* v. *Nurdin*, 1 Q. B. 29, are not inapplicable: "For if I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first. If, for example, a gamekeeper returning from his daily excercise should rest his loaded gun against a wall in the playground of schoolboys, whom he knew to be in the habit of pointing toys in the shape of guns at one another, and one of these should playfully fire it off at a schoolfellow, and maim him, I think it will not be doubted that the gamekeeper must answer in damages to the wounded party." And the court cite in support of the proposition the case where a man left his horse, attached to a cart, unhitched in a crowded street, and a passer-by struck it, whereupon it ran away and caused an injury to a third person. It was held that the owner of the horse was liable to the person injured: *Illidge* v. *Goodwin*,, 5 Car. & P. 190. See *McCahill* v. *Kipp*, 2 E. D. Smith 413; *Siemers* v. *Eisen*, 54 Cal. 418; *Cox* v. *Burbridge*, 13 C. B. (N. S.) 430. So, where the owner of a horse permitted it to go at large in a populous street in a city, and the horse kicked and injured a child of ten years of age, the owner was held liable for the injury: *Dickson* v. *McCoy*, 39 N. Y. 400. Yet where the fumes of crude petroleum, carried in a tank on a lighter used in the oil trade, escaped into a locker, which, on a night when the vessel lay with others at a pier in Jersey City, with no watchman on board, was forced open by a thief, who, exploring the locker with a lighted match, set fire to the gas, causing an explosion and a fire, whereby the lighter, and another that lay alongside, were destroyed, it was held that the owner of the lighter was not liable: *Scofield* v. *Sommers*, 9 Ben. 526.

In an English case the circumstances were these: the defendant sent a young girl (thirteen years of age) to bring him his loaded gun, directing her to request the person who was to give it to her to take out the priming. This was done, and the gun handed to her. She in play pointed it at the plaintiff's son, a child of eight years of age, and drew the trigger; the gun went off and injured the child. It was held that the defendant was liable in damages to the plaintiff for the value of the child's service: *Dixon* v. *Bell*, 5 Maule & Sel. 198.

But where the defendant negligently sold gunpowder to a child, and the child's parents took charge of the powder, and afterwards let the child take some of it, by the explosion of which he was injured, it was held that the sale was only a remote cause of the explosion, and the child could not recover against the defendant: *Carter* v. *Towne*, 103 Mass. 507.

And where the defendant gave the plaintiff a carboy, or large bottle, of nitric acid, to carry, without informing him of the dangerous nature of the acid, and the carboy burst, and the acid inflicted dangerous wounds upon the plaintiff, and burnt and destroyed his clothes, it was held that the defendant was responsible for damages for the injury: *Tarrant* v. *Barnes*, 11 C. B. (N. S.) 553; s. c. 31 L. J. (C. P.) 137. See *Bross* v. *Maitland*, 6 El. & El. 470.

So where the defendant broke and entered the plaintiff's close lying adjacent to a river, dug into a bank near a dam across the river, and carried away some gravel, in consequence of which a flood in the river, which took place three weeks afterwards, carried away a portion of

the close, and a cider-mill, &c., belonging to the plaintiff, it was held that the plaintiff might recover damages for the whole of such injury: *Dickinson* v. *Boyle*, 17 Pick. 78.

So where the defendant wrongfully placed a deleterious substance near the plaintiff's well, and a freshet caused it to spoil the water, he was held liable in damages, although he had no intention of causing an injury to the water: *Woodward* v. *Aborn*, 35 Me. 271. And where the deceased was compelled by the conductor to stand upon the platform of a crowded car, and, while there, was thrown from the car by the hasty and careless departure of another passenger, it was held that the car company was liable in damages, and that the wrongful act of the passenger did not relieve the defendant company from the consequences of their wrongful act in placing the deceased upon the platform: *Sheridan* v. *Brooklyn, &c., Railroad Co.*, 36 N. Y. 39.

The doctrine of the principal case is limited by the fact that the intervening agency is one which the first actor was bound to anticipate. And so the court says the defendant was bound to know that a possible result, or even a probable result, was the act of the child who held the pistol when it was fired and killed his brother. This finds a fair illustration in *Sharp* v. *Powell*, L. R., 7 C. P. 253; s. c., 20 Week. Rep. 585, 41 L. J. (C. P.) 95; 26 L. T. (N S.) 436. There a servant of A., in violation of a statute, washed a van in a public street, and allowed the waste water to run down the gutter toward a grating leading to a sewer about twenty-five yards off. In consequence of the extreme severity of the weather, the grating was obstructed with ice, and the water flowed over a portion of the causeway, which was ill-paved and uneven, and there froze. There was no evidence that A. knew that the grating was obstructed. The plaintiff's horse, while being led past the spot, slipped upon the ice and broke its leg. It was held that this was a consequence too remote to be attributed to the unlawful act of A.'s servant.

So where a party of slaves assembled at the house of C., at night, to dance and frolic, and it was a violation of a statute for C. to thus allow them to assemble; in the course of the night, a patrol went to arrest the slaves, and, while they were attempting to escape, fired a loaded pistol into a dark room and killed the slave of E. C. was held not liable to E. for the value of the slave, the unlawful act of C. in permitting the slaves to assemble being but a remote cause of the damages: *Bosworth* v. *Brand*, 1 Dana 377.

Injuries received by a Child while Trespassing.—The case of *Lynch* v. *Nindin*, 1 Q. B. 29, cited by the court, was a case where the defendant's servant left his horse and cart unattended in a populous street. The plaintiff, a child seven years old, got upon the cart, in play; another child made the horse move on while the plaintiff was in the act of getting down from it, in consequence of which the plaintiff was thrown down and had his leg broken. The defendant was held liable in an action on the case, although the plaintiff was a trespasser, and contributed to the mischief by his own act. It was held that it was properly left to the jury to find whether the defendant's servant was guilty of negligence, and if so, whether that negligence caused the injury in question. Upon the question of contributory negligence this case is not the law now in England: Moak's Underhill on Torts 288. This is the leading English case upon the question of the right of a child to recover for damages sustained while he is in the commission of a trespass.

In another case the facts were as follows: The defendant exposed in a public place, for sale, unfenced and without

superintendence, a machine which could be set in motion by any passer-by, and which was dangerous when in motion. The plaintiff, a boy four years old, by the direction of his brother of seven, placed his finger within the machine while another boy was turning the handle which moved it, whereby his finger was crushed. The defendant was held not liable, because the wrongful act of the plaintiff had brought the act upon him, and besides the defendant was guilty of no negligence: *Mangan* v. *Atterton*, L. R., 1 Exch. 239; s. c., 4 Hurl. & Colt. 388. But it may be well doubted if the case is an authority so far as the question of the negligence of the defendant is concerned, since the remarks of Chief Justice COCKBURN in *Clark* v. *Chambers*, 3 Q. B. Div. 327, 339. The case of *Lane* v. *Atlantic Works*, 107 Mass. 104, is an instructive one upon this subject. An ordinance prohibited trucks standing in the street longer than five minutes at a time. The defendant left his truck, loaded with a heavy iron, for the night in the street. Two children, seven and eight years old, crossed the street at the solicitation of a boy, twelve years of age, and mounted the truck, three hours after it was left there. The casting had been placed upon the truck in a careless manner. Within one minute after the two boys reached the truck, the elder boy moved the tongue of the truck and threw the casting down upon the younger boy, to his injury. It was held that if the truck was left negligently in the street or left insecure, and the occurrence by which the injury was received was one which might have reasonably been apprehended as the result of such negligence, and was in fact the result thereof, and the plaintiff used due care, the wrongful conduct of the boy who moved the truck would not relieve the defendant from liability, although it contributed to the result. The case of *Railroad* v. *Stout*, 17 Wall. 657, was where a child, six years of age, sued a railroad company for an injury received while riding upon a turn-table turned by some boys. The plaintiff was clearly a trespasser; yet the company was held liable because the company had failed to fasten the turn-table so it could not be moved. See *Birge* v. *Gardner*, 19 Conn. 507.

W. W. THORNTON.

Indianapolis.

Supreme Court of the United States.

PHŒNIX MUTUAL LIFE INS. CO. *v.* DOSTER ET AL.

If the conduct of an insurance company, in its dealings with the insured and other policy holders, is such as to induce a belief that so much of the contract as provides for forfeiture for non-payment of premium on the days fixed would not be enforced if payment were made within a reasonable period thereafter, the company will not be permitted to allege such forfeiture against one who acted upon that belief and subsequently made or tendered the payment.

If the company are in the habit of sending renewal receipts to its agent, leaving their use subject entirely to his judgment, and he is accustomed to receive premiums from the insured several days after they become due, and the company or its managing agents or officers have full knowledge of such practice and receive and retain the premiums so paid, and the insured relying on such practice tenders the premium within a reasonable time after it is due, the company cannot forfeit the policy not-